IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No 3136 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHAMPAKBHAI AMIRBHAI VASAVA

Versus

STATE OF GUJARAT

Appearance:

MR MHM SHAIKH for Petitioner

Mr. SK Patel, APP for Respondent No. 1

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 30/04/2001

ORAL JUDGEMENT

Heard learned advocate Mr. Shaikh for the petitioner and the learned APP Mr. SK Patel for the respondent State. In this petition, the petitioner has

challenged the order passed by the learned Additional Sessions Judge, Bharuch in criminal misc. application no. 252 of 2001 dated 17th April, 2001. The offence has been registered against the petitioner at CR No. 143 of 1999 under section 406, 409, 461 alleging that the petitioner has misappropriated the amount worth Rs.6,00,000/-. In the FIR, name of the petitioner is there and no other person has been shown as the co accused.

Learned advocate Mr. Shaikh appearing for the petitioner has raised contention before this court that in view of the filing of the offence at CR No. 143 of 1999, the petitioner was arrested by the concerned police authority on 10th February, 2000 and since then, he is in jail. He has submitted that in identical case being CR NO. 114 of 1999, in all, Rs.29,04,750.00 have been alleged to have been misappropriated by the petitioner. He has submitted that in connection with the offence registered at CR NO. 114 of 1999, this Court (Coram : Pradeep Kumar Sarkar, J.) has released the petitioner on regular bail in criminal misc. application no. 280 of 2001 by order dated 19th January, 2001 and, therefore, the petitioner is entitled to be released on bail. The next contention raised by Mr. Shaikh has been that one co accused in CR No. 143 of 1999 namely Shri Chandrakant V. Mistry has been released on bail by the Additional Sessions Judge, Bharuch by order dated 17th February, 2000 and, therefore, on the ground of parity, the petitioner is entitled to be released on bail.

Reliance has been placed upon the three decisions of the apex court which are as under:

(1) JT 2000 (1) SC 185 in case of Ramnarayan Singh and others versus State of Bihar.

(2) 1998 (5) SCC 607 in case of Sunil K. Sinha versus State of Bihar.

(3) 1984 GLH 515 in case of State of Gujarat v. Bhagirathsinh Jadeja.

I have gone through the decisions which were cited by Mr. Shaikh. IN case of Ramnarayansinh (supra), the offence charged was under section 406, 420 r/w. S. 34 of the IP Code for the offence of cheating and misappropriation and the appellant was in custody for more than nine months. The application for bail during the pendency of the trial was rejected by the High Court

with a right to renew the prayer for bail if the trial did not commence within six months. It has been held by the apex court after considering the manner in which the trial was proceeding and the appellant was ordered to be released on bail.

In case of Sunil K. Sinha (supra), the appellant under trial prisoner has undergone long incarceration without trial for a period of about one year and ten months and the trial was likely to consume some more time. In such circumstances, the apex court directed that the undertrial prisoner be released on bail on a condition to surrender his passport before the trial court (special Judge).

In case of State of Gujarat versus Bhagirath Jadeja (supra), which was a matter relating to cancellation of bail, the apex court has observed that very cogent and overwhelming circumstances are necessary for an order seeking cancellation of bail. It is now settled by catena of decisions that the powers of granting bail have not to be exercised as if the punishment is being imposed before trial. In the said decision, the apex court has laid down certain criteria for consideration. The only material consideration in such a situation is as to whether the accused would be readily available for trial and whether he is likely to abuse the discretion granted in his favour or not by tampering with the evidence and/or witnesses.

I have considered the decisions cited by Mr. Shaikh at the Bar. I have also considered the submissions made by Mr. Shaikh as well as the learned APP Mr. Patel.

In the present case, the petitioner is the bank employee and looking to the filing of the two FIRs namely CR NO. 114 of 1999 and 143 of 1999, the offence alleged against the petitioner is serious one to the effect that according to the complainant, an amount of Rs.29,04,750.00 has been misappropriated by the bank employees and the petitioner is the Cashier of the bank who is dealing with the cash transactions, with the amount which has been received by the bank and in such a situation, in the capacity of cashier, he has, prima facie, committed serious offence of misappropriation of Rs.29,04,750.00. In his order, the learned sessions judge concerned has considered this aspect of the matter. It is necessary to note that the first offence has been registered against the petitioner is the CR NO. 114 of 1999 in respect of the misappropriation of total amount of Rs.29,04,750.00 and the second is M. Case No. 11 of

1999 and the third is the CR No. 143 of 1999 wherein the petitioner is alleged to have misappropriated an amount of Rs.6,00,000.00. The trial Court has also considered the FIR, Record in respect of the payments which have been shown by the petitioner to be made and no transfer voucher and cheques are available on record. The trial Court has also considered the statement of the Bank Manager Amratbhai Patel dated 9th August, 1999. The trial court has also considered the statement of Narendra M. Patel dated 1st November, 1999 wherein he has specifically mentioned that in his account, more than Rs.4,50,000.00 was available but in ledger, less amount has been shown by the petitioner and the petitioner has played roll in misappropriation of the amount. The learned additional sessions judge has also considered the decision of this court which has been cited by the petitioner and has ultimately come to the conclusion that the petitioner has been involved in the misappropriation of the amount of more than Rs.6,00,000.00 wherein the punishment of life time imprisonment has been provided and, therefore, considering the fact that in the present situation, economic offences are committed by such employees which would require serious consideration while considering the bail applications and, therefore, the learned sessions judge has rightly rejected the application for bail while exercising the discretion under section 439 of the Code of Criminal Procedure, 1973.

The present petitioner has been released on bail in connection with the offence registered at CR No. 114 of 1999 in criminal misc. application no. 280 of 2001 dated 19th January, 2001 by considering the long duration of judicial custody of the petitioner and except that, there was no other ground for releasing him on bail in the said offence. As regards the release of the co accused Chandrakant V. Mistry, the learned Additional Sessions Judge has observed in his order (page 16) that the cheque which has been given by the Chairman of the Mandali to Chandrakant Mistry for FD and the cashier has given transfer receipt which has been produced by Mistry before the bank and those documents are in custody of the bank and in view of these facts, Chandrakant V. Mistry has been released on bail. Mistry was working as a secretary and the petitioner was working as a cashier. Considering the responsibility of cashier while working in the scheduled bank, parity cannot be granted to the petitioner herein.

The powers which have been exercised by this court under section 439 of the Code of Criminal Procedure

are discretionary powers which have to be exercised judiciously while keeping in view the facts and circumstances of each case.

In JT 2000(1) 185, while granting the bail in favour of the petitioner therein, the court has considered the manner in which the trial was proceeding and that is why the bail was granted in the said matter. In second case reported in 1998 (5) SCC 607, the apex court has granted regular bail in favour of the petitioner because of the fact that the trial will take some time and the petitioner in the said matter was in judicial custody for about more than one year and ten days and in case of State of Gujarat versus Bhagirath Sinh Jadeja (supra), the apex court has laid down certain principles while considering an application for cancellation of bail which has been considered by this court in case of State of Gujarat versus Lalji Popat reported in 1988 (2) GLH 114 which reads as under:

(1) The nature of the charge is the vital factor and the nature of evidence is also pertinent.

(2) The punishment to which the accused may be liable if convicted.

(3) While considering the question of granting bail under section 439 (1) of the Criminal Procedure Code, this Court should take into consideration the provisions of S. 437 (1) inspite of the fact that under S. 439(1) the High Court and the Sessions Court have wide jurisdiction to grant bail.

(4) The nature and gravity of the circumstances in which the offence is committed say highway robbery or dacoity, gang rape, murder or murders because of group rivalry, attack by one community on other community or such other cases.

(5) The position and the status of the accused with reference to the victim and the witnesses say in case of burning of house wife, witnesses may be neighbours, their evidence might be tampered with by any means.

(6) The reasonable possibility of the presence of the accused not being secured at the trial.

Merely because the accused is the owner of the large property, movable or immovable, would be no

ground to presume that the presence of the accused would be secured at the trial by granting him bail. For this purpose, the charge, the nature of evidence by which it is supported and the punishment to which the party would be liable, if convicted, are to be taken into consideration. In cases of the highest magnitude of punishment assigned under the law the court can reasonably presume that no amount of bail was sufficient to secure the presence of convict at the stage of judgment. In some cases, accused may leave the country or go underground in such a manner that it becomes difficult to trace him out.

(7) Any likelihood of tampering with the witnesses.

This also depends on the seriousness of the offence and the nature of evidence. In serious offences if the accused are released on bail, they would be tempted to tamper with the evidence by hook or crook. Therefore, the position and the status of the accused with reference to the victim and the witnesses and the events leading to the incident and the history of the accused are required to be taken into consideration. As observed by the Supreme Court, in regard to habituals, it is part of criminological history that a thoughtless bail order has enabled the bailee to exploit the opportunity to inflict further crimes on the members of the society.

(8) Jeopardizing his own life being faced with the grim prospect of possible conviction in the case.

(9) The prospect of victim or his relatives indulging in private retribution who feel helpless and may believe that law may not protest them.

(10) The larger interests of public, society or the State.

(11) Similar other circumstances depending on facts and peculiarity of each case.

It should be noted that law regarding bail cannot be static in each case the Court has to decide it on facts of each case and in the interest of justice and fair trial.

Recently, powers under section 439 of the Code of

Criminal Procedure have been considered by this court in light of having legal right under Article 21 of the Constitution, in case of Ishaq I. Sandhi versus State of Gujarat reported in 2000 (3) GLH page 453. In para 6 and 7 of the report, this court has observed as under:

"6. From the police papers, the learned APP draws my attention to the statement of Kishorsinh Jayavant Jadeja, who is running his STD Booth. What appears from his statement is that the applicant was often going to his Booth for having telephonic talk with the other scamsters involved in the conspiracy. Whatever he was talking on phone was being over heard by this witness. According to this witness, during the talk, the petitioner was inquiring how many fake currency notes and of what denomination were required and how he should supply the same and when, for putting the same into circulation through different persons/agencies. His such statement, at present, is sufficient to prima facie hold that he is involved in the offence alleged. Now, the next question that arises for examination is about other considerations, which guide the Court in the exercise of the discretionary powers. The guiding considerations are:

1. Whether releasing the accused on bail is in any way forbidden by any statutory provision ?

2. Whether he would intimidate the witnesses or win-over them for getting support to his defence and/or for abstaining from supporting the prosecution ?

3. Whether he would be available easily at the time of his trial and would submit to the custody if convicted and sentenced at last or would flee and would not be available ?

4. Whether he would tamper with the evidence?

5. Whether he would commit like wise or any other offence or wrong directly or indirectly remaining behind curtain ?

6. Whether he would be retributive or revengeful or retaliative i.e. whether his release will endanger safety of the persons, viz.

complainant and witness or other concerned or property ?

7. Whether his own safety is likely to be endangered ?

8. Whether larger good, national interest, social order, national security, public safety and/or health are likely to be jeopardized ?

9. The nature and gravity of offence being shocking and alarming or barbaric and day in and day out its effect spreads panic amongst the people or section of the people or damages civilization in the society turning back to jungle law ?

10. Other peculiar circumstances of each case appearing on record dictating the exercise of discretion in particular way ?

To state in short in different words, is to examine whether accused after being enlarged on bail, is likely to act or behave in a manner injurious to the interest of the prosecution or larger good, or national interest misusing the liberty granted. If the answer to any of the above first nine points is in the affirmative, or the consideration of 10th point signals premonition or forewarning of any evil or wrong or misfortune and puts the Court at its guard the bail must ordinarily be refused.

7. The learned Advocate for the applicant has claimed bail on the principle of "bail and not jail", based on liberty guaranteed under the Constitution. Often in bail matters, the principle is sought to be loosely applied so as to get the bail anyhow. It is, hence, necessary to dissipate mistaken impression. No doubt, "Bail and not jail" is well cherished principle based on a right to personal liberty not only safeguarded but put at the highest pedestal also vide Article 21 of the Constitution of India; and so ordinarily personal liberty is the governing factor in case of bail, but the same cannot be stretched too far or beyond its normal frontiers. It does not and cannot have dominion over larger interest, social order, public safety, public health and of course, national interest or security as well or possibility of liberty being

abused. The claim of the accused seeking bail therefore cannot be countenanced if it is likely to run counter to the larger interest, social order, public safety, public health or national interest. To put it in different words, bail cannot be granted under the guise of liberty if there is likelihood of accused's subjugating larger interest, public safety social order or well being and national interest or security or there is possibility of accused's misusing or abusing his liberty after bail. In case of such likelihood, any subtle attempt to get bail under the guise of liberty must be frowned upon and frustrated."

Considering the observations made by the learned Additional Sessions Judge in connection with Criminal Misc. Application NO. 252 of 2001 dated 7th April, 2001 and also considering the decisions of the apex court as well of this court, as per my view, this is a very serious offence as per the two FIRs committed by the petitioner which have been prima facie established against the petitioner. Not only that but there is prima facie evidence against the petitioner as has been observed by the learned Additional Sessions Judge. If the employee of the bank would commit such serious offence then, the customer whose amount has been lying in the bank will not be safe and the amount will not be secured. As per my view, such matters cannot be viewed lightly and, therefore, merely in view of the long detention or that there are no chance of his absconding or about tampering with the evidence are not the only criteria to be borne in mind while considering the bail application but there are other considerations while examining bail application to the effect that if the serious offence is committed by the petitioner which would be adversely affecting the public at large, society at large, discretion cannot be exercised. If such offences are viewed lightly, then, the confidence of the public in the Scheduled Banks will be shakened and, therefore, as per my view, this is not the fit case for exercising the powers under section 439 of the Code of Criminal Procedure and the bail application is therefore required to be rejected.

In case of Prahlad Singh Bhati versus N.C.T. Delhi reported in 2001 AIR SCW 1266, the apex court has observed as under in para 8 of the reports :

"8. The jurisdiction to grant bail has to be

> exercised on the basis of well settled principles having regard to the circumstances of each case and not in an arbitrary manner. WHile granting the bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof the severity of the punishment which conviction will entail, the character, behaviour means and standing of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public or State and similar other considerations. It has also to be kept in mind that for the purpose of granting the bail, the Legislature has used the words "reasonable grounds for believing" instead of "the evidence" which means the Court dealing with the grant of bail can only satisfy it as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of the charge.It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

Therefore, in view of the facts and circumstances of the case and also in view of the principles laid down by the apex court in decisions referred to hereinabove, this application is required to be rejected. Same is, therefore, accordingly rejected.

30.4.2001. (H.K. Rathod,J.)

Vyas